



Dated: January 16, 1997

Case No.: 95-JSA-1

JULIO SMITH FELICIANO
Complainant

v.

LANDIS WALKER
Respondent

Julio M. Lopez Keelan, Esq.
San Juan, Puerto Rico
For the complainant

Landis Walker, pro se

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This is a dispute for reimbursement of transportation fees arising under the Federal Job Service Complaint System, 20 C.F.R. 658.420 *et seq.* A formal hearing was held in San Juan, Puerto Rico on November 6, 1996. Complainant was present at the hearing and employer participated simultaneously by telephone from the Job Service office in Danville, Virginia. The record was closed on November 29, 1996 with the receipt of the complainant's post-hearing brief.

Complainant contends that he is entitled to reimbursement for his round-trip travel expenses between Puerto Rico and Virginia because he was injured on the job and terminated without cause in violation of his work agreement. Employer contends that complainant is not entitled to reimbursement of these expenses because he did not satisfy the length of employment requirements of the work agreement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

A. Background

The complainant, Julio Smith Feliciano, resides in Puerto Rico. He began work at the farm of employer, Landis Walker, on June 23, 1993 (TR 67). The work agreement between complainant and the Virginia Agricultural Growers Association indicated that complainant's period of employment would extend from June 22, 1993 to October 14, 1993 (CX 1, CX 2).

Complainant alleges that he was injured on the evening of July 28, 1993 when a tobacco rack fell on the left side of his leg (TR 46). He states that he was injured from a point just under his waist on his front left leg around to the left side of his lower back and that pain radiated up towards his back (TR 50). Complainant did not work for employer on July 29 or 30, 1993 and the employer contends complainant informed him on July 31, 1993 that he had been injured on July 28, 1993 (TR 67). Complainant contends that he informed employer the day after his alleged injury that he had an accident and requested that employer take him to the hospital (TR 46-47). He alleges that employer told him to stay at the house where the workers lived, and when complainant would not work the next day, employer told him that he was going to have complainant moved to another farm (TR 46-47).

Complainant was taken by the employer to Dr. Dudley on August 3, 1993 (TR 83-84). Dr. Dudley diagnosed complainant as having hypertension, back pain which was believed to be muscular in origin, and a small contusion on the lower left quadrant (CX 3). Complainant maintains that he continued to experience pain after he saw the doctor and felt as if he could not perform work which required squatting or bending down (TR 49-50). Complainant states that he asked employer for a different job that did not require squatting or bending down, but that employer claimed all jobs required bending and thus complainant would have to return to Puerto Rico (TR 50).

Employer states that the night complainant alleges he was injured, July 28, 1993, there was no mention by any of the employees that an accident took place (TR 79). Employer also contends that complainant appeared to be in "great shape" in the days following the alleged accident (TR 81). On July 30, 1993, the day before employer alleges that complainant told him about the accident, employer says that complainant stated that he did not want to do jobs that required bending, like harvesting tobacco, because he did not want to do that type of work (TR 74). After employer took complainant to the doctor on August 3, 1993, employer attests that the doctor gave no indication that complainant was unable to work (TR 84).

On the evening of August 3, 1993 complainant and employer met with Eloise Wilder of the Virginia Agricultural Growers Association (TR 84-85). Ms. Wilder testified that everyone

¹Citations to the record of this proceeding will be abbreviated as follows: CX--Complainant's Exhibit; EX--Employer's Exhibit; AF--Administrative File; TR--Hearing Transcript

present at that meeting acknowledged that there was an accident where a tobacco rack fell and hit complainant (TR 103). Employer and Ms. Wilder contend that complainant was offered placement at another farm and that complainant refused, stating that he wanted to return to Puerto Rico at the expense of employer (TR 85, 100). Complainant contends that at this meeting he was offered a job at another farm by employer and Ms. Walker, but that employer said that all of the work required bending and that complainant either had to do this type of work or return to Puerto Rico (TR 55). Complainant contends that he was then fired by employer (TR 56).

Complainant left employer's farm on August 4, 1993 (TR 56, 85). He left the United States for Puerto Rico on August 5, 1995 (*id.*).

B. Discussion

It is employer's position that complainant did not work long enough to be entitled to receive reimbursement for either inbound or outbound transportation (TR 85-86). Pursuant to 20 C.F.R. 655.102 (b) "if the worker completes 50 percent of the work contract period," the employer is responsible for inbound transportation costs. If the worker completes the entire contract period, the employer is responsible for outbound transportation costs as well (*id.*). Employer thus contends that because complainant did not complete even 50 percent of the contract he is not entitled to any transportation costs.

Complainant contends that he is entitled to both inbound and outbound transportation costs because he was injured while working for employer which led to his termination without cause which violated his contract.

I find that the complainant has established he was injured while working for employer. While employer argues that there was no mention of any accident, employer was not present at the time of the accident and he presented no witnesses to refute the occurrence of complainant's injury. Furthermore, complainant credibly testified that he was injured and this testimony was corroborated by Ms. Wilder, who stated at the hearing that "everybody there [at the August 3, 1993 meeting] acknowledged that there was an accident.... Everyone present said that the tobacco rack had fallen" (TR 103). Finally, medical examination of complainant by Dr. Dudley indicates that complainant had an injury consistent with the tobacco rack falling on his body (EX 3). Therefore, I find that complainant was injured when a tobacco rack fell on him while working for employer on July 28, 1993.

The evidence also indicates that complainant was terminated without cause. Paragraph 11 of the Work Agreement signed by complainant and employer states:

Termination: Employer may terminate the Employee for a lawful job-related reason if the Employee: A. Abandons this employment; B. Refuses without justified cause to perform as directed the work for which the Employee was recruited and hired; C. Commits a serious act of misconduct or a serious or repeated violation(s) of the Employer's Work Rules; D. Fails to perform in a workmanlike manner to enable Employer to produce, harvest and market a premium quality product; E. Malingers or otherwise fails or refuses

to work in accordance with directions; F. Provides other lawful job-related reason for termination of employment (EX 1)

Parts A and B of the above paragraph are the most relevant to this case. Concerning Part A, complainant did not abandon his employment. He informed employer that he was injured and requested that the employer place him in a job which would not aggravate his injury (TR 50). Concerning Part B, complainant was justified in refusing to perform the work that employer requested which required bending because complainant was injured. There is no evidence to suggest that complainant would have refused work that did not require bending.

Although the employer states that he assumed that complainant could work because the doctor's report did not specifically indicate that complainant was unable to work, the doctor's report is ambiguous at best. Accordingly, employer had an insufficient basis to conclude that the complainant was not disabled. Complainant made it clear to the employer that he was in pain, and employer should have obtained a more definitive opinion from the doctor regarding the extent of complainant's injuries before refusing to move him to a job where he would not be required to bend. Because employer refused to move complainant to a job that would not aggravate his work related injury, I find that complainant was constructively fired without cause. Terminating an employee without cause violates the provisions of Paragraph 11 of the Work Agreement. Therefore, I find that employer should pay complainant's transportation expenses.

C. Transportation Expenses

Complainant seeks \$599.00 in transportation expenses. This amount is based on the cost of the following items:

10.00	-- Taxi fare from San Juan to Airport
\$195.00	-- Airplane ticket from San Juan to New York
78.00	-- Bus fare from New York to Virginia
78.00	-- Bus fare from Virginia to New York City
228.00	-- Airplane ticket from New York to San Juan
<u>10.00</u>	-- Taxi from San Juan Airport to complainant's home
\$599.00	-- total transportation expense

I find that the above transportation expenses are reasonable, and complainant is entitled to full reimbursement of these expenses.

ORDER

IT IS ORDERED that:

Landis Walker shall reimburse the complainant for his transportation expenses in the amount of \$599.00 within 30 days of the date of this order.

JEFFREY TURECK
Administrative Law Judge